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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 92

FLORENCE GUGGENHEIM,

Petitioner,

v.

ALMON Q. RASQUIN, individually and as United States Collector of Internal Revenue for the First District of New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER.

PAUL B. BARRINGER, JR.,
Attorney for Petitioner.

Of Counsel:
JOHN G. JACKSON, JR.

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This brief is filed pursuant to permission granted by the Court on January 7, 1941.

Respondent states, on page 10 of his brief, that:

> "The value of all the rights which together constitute the life-insurance policy should not be telescoped into the value of the single right to receive a predetermined amount upon surrender."

These rights are stated to be the right to retain the policy as an existing contract and to enjoy its investment feature, the right to receive the face amount of the policy upon the

insured's death, and in some instances, the rights of optional modes of settlement.

The optional modes of settlement are merely methods of paying the face amount of the policy at the death of the insured other than by a straight payment of the face amount. Typical options are monthly instalments for a definite number of years, continuous instalments, fixed income, etc. (R. 31, 47, 61, 83, 99, 117, 137, 151, 165.) These rights are therefore no more than the right to receive the face amount of the policy on the death of the insured.

It is submitted that the right to enjoy the investment feature, the right to borrow, and the right to receive the face amount of the policy on the death of the insured are all contained and reflected in the cash surrender value. *The cash surrender value is the present cash equivalent of all of the rights and benefits available to the holder of the policy. The cash surrender value will increase in amount and reflect the increase in value of the policy in proportion to the length of time the policy is held.* In other words, the cash surrender value at any given date represents the face amount of the policy and all of the rights and benefits incident to the ownership of the policy discounted on the basis of the insured's life expectancy.

When one purchases a single premium life insurance policy from an insurance company, he pays a certain price. This price is greater then the policy's cash surrender value, and the difference is the expense incident to the issuance of the policy. This expense unquestionably has some intrinsic value to the insured for otherwise he would not have purchased the policy. This expense, however, does not go to increase the fair market or asset value of the policy which is the value to be determined under Regulations 79.

When the policy is assigned as a gift, this expense or intrinsic value is lost to the insured and not received by the assignee. The assignment is a new and separate transaction, unrelated to the original purchase, and the issued policy is what then must be valued. What is it worth in a

willing buyer-willing seller market? It is submitted that it cannot be worth more than its cash surrender value, for if it was, a business would have arisen of purchasing issued life insurance policies at a price in excess of their cash surrender values.

The cash surrender value is the minimum and the maximum amount which the holder of a policy can obtain for a policy in the insurance market. As stated by the District Court, (R. 180):

> "Judicial notice may well be taken that cash surrender values as determined by insurance companies are based upon strict actuarial computations; and there is no suggestion that in the open market a buyer could be found who would pay a greater sum for the policies than that which the insurance actuaries determine to be their cash surrender values."

Respondent states, on page 11 of his brief, that the cash surrender value is fixed by insurance companies to discourage surrender of policies. It is submitted that this cannot be the case, in view of the strict actuarial computations, and secondly, because there is strong competition between insurance companies to fix the cash surrender values of their policies as high as can be justified, in order to render their policies more attractive to potential purchasers. The same forces of competition which determine the market price in the case of property in general operate to determine the surrender value in the case of insurance policies. This is particularly true of single premium policies, where the policies are so nearly alike that the one carrying the highest surrender value will be the one that is the easiest to sell.

The respondent has argued that the history of Section 1108(a) of the Revenue Act of 1926 plainly shows that Congress intended the Treasury to have full and complete discretion to determine to what extent changes in the regulations are to operate retro-actively. It is submitted, as

evidenced by the legislative history and by the reports of the Conference Committee and the House, Ways and Means Committee, (respondent's brief, pages 29-31), that the intention of Congress was to give the Treasury more discretion to apply regulations prospectively only. As stated by the Conference Committee (respondent's brief, page 29, footnote 6):

> "It is hoped that this provision will prevent the constant reopening of cases on account of changes in regulations or Treasury decisions, and it is believed that *sound administration properly places upon the Government the responsibility and burden of interpreting the law and of prescribing regulations upon which the taxpayers may rely;* * * *". (Italics supplied.)

The respondent states, on page 21 of his brief, that the Treasury, at the time of the 1936 regulations, "had had no experience with gifts of single-premium insurance policies simultaneously with their issuance and the regulations accordingly did not attempt to provide specially for such a combination of transactions." It is submitted that it is not only difficult to believe this statement, but also that there is nothing in the record to substantiate any such statement.

As stated in petitioner's brief, pages 18 and 19, Congress itself has approved cash surrender value as the best measure of value for purposes of the Bankruptcy Act. The Interstate Commerce Commission has adopted cash surrender value as reflecting the true asset value of insurance policies for purposes of the Uniform System of Accounts for carriers subject to the Motor Carrier Act.

The Commissioner of Internal Revenue was successful in contending, in *Behrend* v. *Commissioner*, 23 B. T. A. 1037, that the cash surrender value represents the amount of a gift of a life insurance policy as a charitable deduction for income tax purposes. The Commissioner successfully contended in *Estate of Louisa Morris Carroll*, 29 B. T. A. 11,

that the cash surrender value of life insurance issued on the husband's life and payable to his estate falls into the estate of the marital community under the law of Louisiana, and that one-half of such cash surrender value should be included in the estate of the deceased wife for Federal estate tax purposes.

All of the foregoing values were based upon fair market value, and not upon the particular intrinsic value the policy may have to the insured. The cost to duplicate a policy or to indemnify an insured is not a true test of fair market value. It is submitted that the Commissioner's regulation, as amended in 1936, is not only an unreasonable and inconsistent interpretation of Section 506 of the Revenue Act of 1932, but is also inconsistent with Article 19(1) of both the 1933 and the 1936 Regulations. Cash surrender value, on the other hand, is a reasonable and accurate measure of the fair market value of a single premium life insurance policy, it is consistent with Article 19(1) of Regulations 79, and it has been approved by Congress reenacting Section 506 in the Revenue Acts of 1934 and 1935.

Respectfully submitted,

PAUL B. BARRINGER, JR.,
Attorney for Petitioner.

JOHN G. JACKSON, JR.,
Of Counsel.